

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1058 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

HARUN @ RASHID KHAMISHA THAIM

Versus

STATE OF GUJARAT

Appearance:

MR JM BUDDHBHATTI for Petitioner No. 1
Mr.K.T. Dave, ADDL. PUBLIC PROSECUTOR for
Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 10/04/2002

ORAL JUDGEMENT (Per : MR.JUSTICE RAVI R.TRIPATHI)

This Appeal is filed under section 374(2) of the Code of Criminal Procedure, 1973, against the judgement and order dated 30.9.1997 passed by the learned Additional Sessions Judge, Jamnagar in Special Sessions

Case No.4 of 1997, by which the appellant, accused no.1 is convicted under section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act" for brevity) and punished with rigorous imprisonment for 10 years and fine of Rs.1 lakh, in default simple imprisonment for one year.

2. On 20.1.1997 when a raid was conducted at the place of one 'Abdulla Dadhi' by Shri Bharatsinh M. Jadeja, P.I. (LCB), Jamnagar with PSI Shri P.K. Jadeja, City P.I. Shri Merujay and other staff members, one Abdul Sattar Abdul Karim, who was accused no.2 in Sessions Case with one Firozkhan Pathan was found with 2.800 K.G. of charas. During interrogation of Abdul Sattar, accused no.2, he revealed that he had sold other quantity of charas to Harun Rashid Khamisa Thaim of 'Jadia Bhunga', the present appellant, original accused no.1 and to one Gani Mamad Bhagad of Bedi. This information was revealed by Abdul Sattar Abdul Karim, accused no.2 in this case to Shri Jadeja P.I. (LCB), Jamnagar. Said information was taken down in writing by Shri J.J. Jadeja, PSI (LCB), Jamnagar and the same was conveyed to the District Supdt. of Police by making a report. P.I. Mr.B.M. Jadeja sent P.I. Shri Charan of City 'B' Division Police Station to carry out the raid at the place of Gani Mamad Bhagad and P.I. Shri B.M. Jadeja with P.S.I. Shri J.J. Jadeja decided to carry out the raid at the place of accused no.1.

2.1 Necessary entry was made in the Station Diary of City 'B' Division Police Station. After calling the Panch witnesses and after drawing preliminary Panchnama, personal search of the Panchas, the members of the staff and also of the Police vehicle, was carried out, but nothing objectionable was found. Thereafter, the raid was carried out at the place of the present appellant, original accused no.1. In the raid from the residential house of accused no.1, a round tin container having 'Bajra' in which a plastic bag containing black substance, four pieces in number, of which two were of smaller size and other two were little larger in size was found. On verification before the Panchas, it was found to be charas. To ascertain the actual quantity of charas, Constable Babulal Jivandas, a member of the raiding party was sent to call a person with weighing scale and the measurements to weigh. Said Constable brought one Bhupat Soni, resident of Jamnagar who weighed the substance. It was 125 grams. From the said substance, a piece weighing about 25 grams was taken and the same was kept in a plastic bag. A slip containing signatures of Panchas and of P.I. and PSI was kept in

that plastic bag. Said plastic bag was kept in a cloth bag which was stitched with the help of a needle and thread. Thereafter, on the said bag, a slip bearing the signatures of Panchas and Police officers was affixed with the seal, bearing inscription, "PSI (LCB)". Remaining Muddamal weighing 100 grams was also sealed as aforesaid. Tin box from which the aforesaid substance was recovered was also seized after affixing a slip containing signatures of the Panchas. The accused was called upon to produce pass or permit for possessing the said substance which was not found with the accused. The accused was intimated about his arrest for the offence under sections 22 and 27 of the NDPS Act by a writing, a copy of which is produced at exh.17, which bears the left hand thumb impression of accused no.1. The same is also signed by P.I. and PSI both.

2.2 The raiding party then brought the accused, Muddamal to the Police Station and an F.I.R. was lodged by PSI Mr.J.J. Jadeja in presence of P.I. Mr.B.M. Jadeja. The papers were handed over to PSO along with the Muddamal and the accused. The PSO made an entry in the Station Diary. A copy of the report made to PSO is produced at exh.13, wherein it is stated that the Panchnama prepared in this case, Muddamal, the accused and 'Chehra Nishan Patrak' of the accused is accompanied herewith. A report made to the PSO for making an entry in the Station Diary is produced at exhibit 14.

3. A report was made to the learned Judicial Magistrate (First Class) regarding arrest and seizure of the Muddamal. A copy of that intimation was produced at exh.18. The sample was sent to Forensic Science Laboratory through Dineshbhai Sukaji, PW 8 and a receipt issued by Forensic Science Laboratory, Junagadh, which is on record at exh.29. The report of the Forensic Science Laboratory is produced at exh.42, wherein it is mentioned that one sealed cloth parcel, mark 'A', was received. There was an inscription, 'PSI (LCB), Jamnagar Jillo' (in Gujarati). The seals were intact and tallied with the 'specimen seal' impressions received. Report of the analysis indicated that the substance analysed was charas as defined in NDPS Act. Further investigation in this case was carried out by PSI Mr.Gulabsinh D. Rajput, who was Reader to Deputy Supdt. of Police, Jamnagar and was serving in City 'B' Division Police Station. On receipt of the report and completion of investigation, the appellant as well as accused no.2 was charge sheeted for the offences punishable under sections 22 and 29 of NDPS Act in the Court of Special Judge of Jamnagar.

4. The learned Judge framed charge at exh.5 against the appellant as well as accused no.2. Charge was read over and explained to the appellant and accused no.2. They pleaded not guilty to the same and came to be tried. Therefore, prosecution examined Jaydevsinh J. Jadeja, PSI, PW 1, exh.10, the complainant; Harendra Hirjibhai, PW2, exh.19, Panch witness to Panchnama, exh.11; Jaman Kanji, PW3, exh.20, another Panch witness to the aforesaid Panchnama; Rafik Mamad, PW4, exh.21, Panch witness to Panchnama, exh.22; Bhupatbhai Odhavji Soni, PW5, exh.23, the person who was called with weighing scale and measurements for weighing the substance; Jayeshbhai Narsibhai, PW6, exh.25, another Panch witness to Panchnama, exh.22; Pravinsinh Dusharji, PW7, exh.26, who was serving as Head Constable, Buckle No.1019 at City 'B' Division Police Station on the relevant date, who had taken Muddamal in custody and after making entry in the register had kept the same in the cupboard under lock; Dineshbhai Sukaji, PW8, exh.28, who was serving at the relevant time as Police Constable at Jamnagar 'B' Division Police Station, who had taken Muddamal to the Forensic Science Laboratory, Junagadh; Bharatsinh Mangalsinh Jadeja, PW9, exh.30, who was serving as PI (LCB), Jamnagar on the date of the incident, who had received intimation in presence of other Police officers; Ghanshyamsinh Gajuma Jadeja, Police Constable, PW 10, exh.31, who was in-- charge Station Officer of City 'B' Division Police Station, Jamnagar; Gulabsinh Dhaniramsinh Rajput, PW 11, exh.35, who was serving as PSI at City 'B' Division Police Station, Jamnagar, who investigated the offence.

4.1 The prosecution had also produced documentary evidence, such as, intimation sent to SO, City 'B' Division Police Station, Jamnagar, exh.14; resolution passed by PSI Mr.Jadeja under section 42(1) of NDPS Act, exh.15; intimation given to the appellant, accused no.1 about search and seizure under section 50, exh.16; intimation given to the appellant, accused no.1 about his arrest, exh.17; report made to the learned Judicial Magistrate (First Class) about the arrest and seizure of Muddamal, exh.18; Panchnama, exhibits 11 & 22; certificate issued by the person who weighed the Muddamal, exh.24; extract from the Muddamal register, exh.27; forwarding letter from Forensic Science Laboratory to the Police Sub Inspector, City 'B' Division Police Station, Jamnagar, the Investigating Officer, exh.29; entry made in the Station Diary, exh.32; F.I.R. exh.33; intimation given to the learned Magistrate, exhibits 36 & 37; forwarding letter to the Deputy Director, Junagadh, exh.38; Forensic Science Laboratory

report, exhibits 41 & 42.

4.2 After recording the evidence of the prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded statement as required under section 313 of the Code of Criminal Procedure, 1973. In his statement the appellant denied the case of the prosecution and stated that the case of the prosecution is false and that he be tried.

5. On appreciation of the evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant-- accused no.1 was found in possession of 125 grams of Charas and that he had committed offence punishable under sec.22 of the NDPS Act. The accused no.1 was acquitted of the offence under sections 27 & 29 of the NDPS Act. The accused no.2 was acquitted of all the charges. The learned Judge concluded that it was proved by the prosecution that the mandatory provisions contained in sec.50, 41, 42 and 52 of the NDPS Act were complied with and that the appellant could not satisfy the Court that breach of any of the mandatory provision of the NDPS Act was committed by the prosecution. After holding that the appellant had committed an offence punishable under sec.22 of the NDPS Act, the appellant was heard regarding punishment as required under sec.235(2) of the Code of Criminal Procedure. Accused no.1 pleaded that he was aged about 27 years and he is the only earning member in the family. He has three children and an aged mother and wife. That the appellant is poor and belongs to labour class. Taking into consideration the economic and social conditions, this being the first offence he should be awarded minimum punishment. The learned Judge thereafter punished the appellant as mentioned earlier by the judgement and order dated 30.9.1997 giving rise to the present appeal.

6. Mr.Budhbhatti, learned advocate appearing for the appellant submitted that in the present case there is violation of section 41(2) of the NDPS Act, which is a mandatory provision inasmuch as Mr.B.M. Jadeja, P.I. (LCB), Jamnagar did not record the information given by accused no.2, i.e. Abdul Sattar Abdul Karim during his interrogation which was carried out at the time of conducting raid at the place of Abdul Abla Dadhi. In the alternative he submitted that if it is held that the raid was carried out by PSI, MR.Jadeja, then there is a breach of mandatory provisions of sec.42(1) of the Act and also that of the provisions contained in subsection (2) of

section 42 of the Act. He submitted that it is admitted that the raid in the present case was carried out after sunset. Therefore, under the proviso to subsection (1) of section 42, if the officer has reason(s) to believe that search is warranted and authorisation cannot be obtained without affording an opportunity for the concealment of evidence or facility for the escape of the offender, he may enter into and search any building, conveyance or enclosed place even between sunset and sunrise after recording the grounds of his belief. He submitted that in the present case Mr.J.J. Jadeja, PSI has not recorded any grounds of his belief nor he has sent a copy thereof to his immediate superior.

7. Mr.K.T. Dave, learned APP supported the judgement and order of the learned Additional Sessions Judge on all counts and submitted that in the present case there is no breach of any of the mandatory provision; all the mandatory provisions of the Act are complied with and therefore, judgement and order of the learned Additional Sessions Judge is required to be upheld by this Court.

8. We have considered the submissions advanced at the Bar by both the learned counsels and reappraised the whole evidence on record.

9. It has come on record that on 21.1.1997 a raid was carried out at the place of Abdul Fakir alias Abul Dadhi and at that time one Abdul Sattar Abdul Karim, resident of Ahmedabad and another Firozkhan M. Pathan were found in possession of illegal opium of 2.800 KGs. During interrogation of said Abdul Sattar Abdul Karim, it was revealed that he had sold other quantity of charas to one Harun alias Rashid Khamisha Thaim, resident of Jodia Bhunga (Bedi), who is present appellant, original accused no.1. He had also revealed that he had sold other quantity of charas to one Gani Mamad Bhagad, resident of Bedi. On receiving this information, a subordinate officer of Shri B.M. Jadeja, P.I. (LCB), Jamnagar had taken down the same in writing and immediately conveyed the same to his superior, namely, Deputy Supdt. of Police. Mr.B.M. Jadeja, P.I. (LCB), Jamnagar, who decided to raid the place of the appellant, accused no.1 himself while another P.I. Mr.Charan of City 'B' Division Police Station raided the place of Gani Mamad Bhagad. It is also on record that immediately on receipt of the aforesaid information which was taken down in writing by the subordinate officer of P.I. Mr.B.M. Jadeja, an entry was made in City 'B' Division Police Station Diary. Thereafter, Panchas were called. They

were explained, after that they showed their willingness to be Panch witnesses. A preliminary Panchnama was drawn and thereafter along with the Panch witnesses, other staff members in a Police vehicle after carrying out inter se search of each other and that of the vehicle and having found nothing objectionable, proceeded for the raid with necessary articles required for such raid, such as, sealing wax, thread needle, cloth bag, etc. The raiding party reached Jodia Bhunga, where they stopped the vehicle and started on foot to Kutchi Pada via Husaini Chowk. They reached the place of appellant-accused no.1 where they found a person present. On inquiry he disclosed his name to be Harun alias Rashid Khamisha Thaim. He was questioned before the Panchas that there was an information that he has charas in his house. Therefore, search is to be carried out. He was also explained that if he wants search to be carried out before any gazetted officer or Magistrate, to which he denied. The accused was given an intimation that the raiding party is to search his residential house as there is information that he is in possession of illegal narcotic drug. A copy of that intimation is produced at exh.16. The search was carried out at his residence consisting of two rooms having southern doors. In the first room a tin box was lying below a wooden stand (Aamachiya). On search of the tin box, charas was found. Therefore, PSI Mr.Jadeja sent a Police Constable, Babulal Jivandas to call a man with weighing scale and measurements. He called one Bhupatbhai A. Soni, PW5, exh.23. On weighing the substance the same was found to be 125 grams. 25 grams of charas was taken out from that. It was kept in a plastic bag and in that a slip bearing signatures of Panchas and that of the Police officers, namely, P.I. Mr.B.M. Jadeja and PSI Mr.J.J. Jadeja was kept. Said plastic bag was then kept in a cloth bag and the same was stitched. Thereafter the same was sealed with a seal bearing inscription, "PSI (LCB), Jamnagar". Similarly, the remaining charas was also sealed and the tin box from which charas was found was also seized and a slip bearing the signature of Panchas and that of the Police officers was affixed on the tin box. The raiding party also found a whisky bottle named 'Queen Dawn' from the other room behind an iron box, which was also seized. A separate offence was registered for the same. The appellant was not found in possession of any pass or permit for charas or liquor. After completing the Panchnama, PSI Mr. J.J. Jadeja filed a complaint in presence of P.I. Mr.B.M. Jadeja for offence under sections 22 and 27 of the Act. It is also on record that right from the moment the information was divulged by said Mr.Abdul Sattar Abdul Karim during the

raid at the place of Abla Dadhi, the P.I. and P.S.I. have remained together and that the information was taken down by PSI and thereafter other procedure was carried out for all practical purposes by P.I., through a subordinate officer, a PSI, like giving an intimation of making entry in the Station Diary, sending intimation to the higher officer, intimation given to the appellant -accused no.1, about the search being carried out at his residence, a copy of which is produced at exh.16, signed by PSI and P.I. both. The intimation given to the appellant about his arrest, exh.17 is also signed by the PSI and PI both. It is on record that the slip which was kept in the sample taken out from the charas, the slip signed by P.I. and PSI both was placed inside which was so found by Forensic Science Laboratory, when the said sample was opened for the purpose of its chemical analysis. In this view of the facts, it cannot be said that the search was carried out by PSI in this case and that the PSI was the searching officer.

9.1 Mr.Budhbhatti, learned advocate appearing for the appellant emphasised that in the cross examination, P.I. Mr.B.M. Jadeja has stated that he himself has not given the information, received, to the superior officer. He has also deposed that in this case Mr.J.J. Jadeja, PSI discharged duty as search officer. Both these submissions of the learned advocate are devoid of any merit, inasmuch as the stray sentences from the deposition of the witness cannot be relied upon for drawing any conclusion. It is the settled principle of appreciation of evidence that the evidence is to be appreciated as a 'whole'. The Court has no doubt in holding that right from the moment, when information was divulged by the said Shri Abdul Sattar Abdul Karim, Mr.B.M. Jadeja, P.I. was accompanied by PSI Mr.Jadeja. Police Inspector is a gazetted officer and therefore, the provisions of section 41 will be applicable. At the time of raid at the place of Abla Dadhi, when the information in question was divulged though physically it was taken down in writing by PSI, it did not cause any prejudice to the present appellant. Said information was forwarded to the superior officer, namely, Deputy Sudpt. of Police. It cannot be said that because the information was sent to the superior officer by PSI and P.I., there is breach of provisions of section 42 of the NDPS Act. It is clear from the record that P.I. Mr.B.M. Jadeja was all along in the company of Mr.J.J. Jadeja, the PSI. Being a subordinate officer, if PSI has acted physically in taking down the information and sending the same to the higher officer, section 41(2) of the Act will be applicable. In fact from the facts which are on record,

it is clear that all necessary documents like intimation to the appellant, exh.16 about search; intimation about arrest, exh.17; slips which are placed in the sample Muddamal were signed by P.I. himself. Thus, the raid was carried out under sec.41(2) of the Act. And the P.I., being a gazetted officer, is empowered under the Act to carry out raid by day or by night, either by himself or by authorising an officer. When the raid was carried out under sec.41(2) of the NDPS Act, the question of compliance of proviso under subsection (2) of section 42 of the NDPS Act does not arise.

9.2 Firstly, in the present case, the search, seizure and arrest were carried out by P.I. Mr.B.M. Jadeja, who was a gazetted officer. Therefore, search was under the provisions of section 41(2) of the NDPS Act. In the alternative, if it is held that search, seizure and arrest were carried out by PSI Mr.J.J. Jadeja, then also he was an authorised officer duly authorised by a gazetted officer. Then also the provisions of section 41(2) of the NDPS Act will be applicable and not that of section 42 of the NDPS Act.

9.3 Mr.K.T. Dave, learned APP pointed out a decision of the Honourable the Apex Court in the matter between State of Orissa v. S. Mohanty and others, reported in AIR 2000 SC 3494. Mr.Dave submitted that the Honourable the Apex Court has held that when search and seizure is carried out by the empowered/ authorised officer, provision of section 41 and not section 42 of the NDPS Act will be applicable.

10. For the foregoing reasons, the appeal fails. The conviction of the appellant recorded under section 22 is to be read as conviction under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The conviction as well as punishment imposed for commission of the said offence are hereby maintained. The Muddamal be disposed of in terms of the direction given by the learned Additional Sessions Judge, Jamnagar in the impugned judgement.

(K.R. Vyas, J.)

(Ravi R. Tripathi, J.)

karim